United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1008

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P/S.

Requested time for argument: 15 minutes.

ORIGINAL

To be argued by Leland Stuart Beck.

United States Court of Appeals

For the Second Circuit.

BLH, INCORPORATED,
Plaintiff-Appellee,

against

HODGE & HAMMOND, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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Table of Contents.

	Page
Statement of the Issues Pursuant to Rule 28 (a) (2)	1
Statement of the Case	1
POINT ONE. Genuine issues of fact relating to liability have been raised in the pleadings, exhibits and affidavits, and the granting of a summary judgment was therefore improper	4
POINT TWO. BLH failed to submit proper proof of all the elements of its cause of action and was therefore not entitled to judgment	8
POINT THREE. The denial of the application for leave to serve a third-party summons and complaint or otherwise permit the dispute to be resolved in a forum where all the parties were before the court was improvident and substantially prejudiced a fair and just result	9
CONCLUSION. The judgment below should be reversed. The entire action should be stayed pending the outcome of the state court proceeding or, in the alternative, a third-party summons and complaint should issue so that all affected parties are brought before the same tribunal	11

CASES CITED.

	Page
Adikes v. S. H. Kress, 398 U. S. 144	4, 8
Doehler Metal Furniture v. U. S., 149 F. 2d 130	5
Electrical Fittings Corp. v. Thomas & Betts Co., 3 F.R.D. 256	9
First National Bank of Cincinati v. Pepper, 454 F. 2d 626 (1972)	5, 7, 8
U. S. v. Diebold, Inc., 369 U. S. 654	4
Zig-Zag Spring Co. v. Comfort Spring Co., 89 F. Supp. 410	8

STATUTES.

Local General Rule 9(m)	7
Rule 14 F.R.C.P.	9
Rule 56 (c) F.R.C.P.	4, 8
Rule 56 (e) F.R.C.P.	8

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FOR THE SECOND CIRCUIT.

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Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT.

Statement of the Issues Pursuant to Rule 28 (a) (2).

1. Are there unresolved genuine issues of fact which require a plenary trial?

2. Was the plaintiff entitled to a judgment on the proofs it submitted?

3. Was the denial of appellant's application for a stay, dismissal, or, in the alternative, for leave to serve a third-party complaint improvident, and did that denial result in substantial prejudice to the appellant requiring a reversal of the judgment?

Statement of the Case.

This is an action by BLH, Inc. (hereinafter "BLH"), against Hodge & Hammond, Inc. (hereinafter designated as "H & H"), for money damages based upon allegations of goods sold and delivered (6a-7a).*

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*Page numbers in parentheses refer to the appendix.

BLH is a manufacturer of heavy equipment. H & H is a sales organization and manufacturer's representative specializing in the field of heavy industrial equipment. Lizza Industries, Inc., and its subsidiary, Midhampton Asphalt Corp. (hereinafter both referred to as "Lizza"), are engaged in heavy general contracting and desired to purchase two semi-portable asphalt plants.

H & H, having no technical knowledge or experience with this type of equipment, called in the District Representative of BLH, Ray Lynn, who negotiated directly with Lizza (65a). These negotiations resulted in the sale of two asphalt plants to Lizza.

Thereafter, Lizza commenced an action in the Supreme Court of the State of New York, Nassau County, against both BLH and H & H for damages caused by reason of an alleged breach of warranty in connection with the larger of the two plants (13a-26a). In its complaint, Lizza specifically alleges that:

> "That on or about the 30th day of July, 1970 a contract was entered into between plaintiffs and defendant Hodge & Hammond, Inc. acting on behalf of the defendant Baldwin-Lima-Hamilton Corporation, for the purchase by the plaintiff of a new Madsen Semi-Portable Asphalt Plant 10,000# capacity for total price of $470,000.00 * * *" (14a-15a).

Both BLH and H & H appeared as co-defendants in that action. H & H interposed counterclaims and cross-complaints in its answer relating to both asphalt plants (54a-59a).

Thereafter, BLH commenced this action in the United States District Court for the Southern District of New York seeking payment from H & H for the same plants

which were already involved in the previously commenced state court action (6a-7a), alleging that the sales were made directly to H & H.

The answer of H & H specifically alleges that it was acting solely as a sales agent (8a-9a) in connection with these sales and denied responsibility for payment to BLH.

As BLH failed to name Lizza as a party to the suit, H & H made a motion seeking leave of the court to serve a third-party complaint so that all parties could be before the court (11a-34a).

Before that motion had been decided, BLH moved for summary judgment (37a-71a). The court below granted summary judgment with respect to the second cause of action relating to one of the plants and stayed proceeding on the first cause of action pending the state court determination (35a-36a).

Therafter, H & H moved for re-argument of the motion on the grounds that substantial error had been committed (73a-77a). The motion for re-argument was granted but the court adhered to the original decision (72a).

The court also denied the motion brought on by H & H for leave to add Lizza as a third-party defendant (11a). H & H appealed to this court from these decisions (79a).

POINT ONE.

Genuine issues of fact relating to liability have been raised in the pleadings, exhibits and affidavits, and the granting of a summary judgment was therefore improper.

It is clear that summary judgment may only be granted when no genuine issue of fact remains unresolved.

Rule 56 (c), FRCP, permits the entry of judgment on motion only

> "* * * if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *."

The party against whom the motion was made, H & H, is entitled to every favorable inference which may be drawn from the pleadings, affidavits and exhibits.

The Court said in *Adikes v. S. H. Kress,* 398 U. S. 144:

> (157) "We think that on the basis of the record, it was error to grant summary judgment. As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."

See also:

U. S. v. Diebold, Inc., 369 U. S. 654.

This court has recently defined the duty of the District Court in ruling on a motion for summary judgment. In *First National Bank of Cincinnati v. Pepper,* 454 F. 2d 626 (1972), the court wrote:

> (632) "* * * that in ruling on a motion for summary judgment it is not the function of the District Court to decide whether the factual allegations and averments of the opposing parties are true * * *."

The function of the District Court should be issue finding and not issue determination. The warning issued by the court in *Doehler Metal Furniture v. U. S.,* 149 F. 2d 130, is relevant:

> (135) "We take this occasion to suggest that trial Judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts * * *. Such a judgment, wisely used, is a praiseworthy time saving device. But although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which Courts have been established. Denial of a trial on disputed facts is worse than delay."

The record below clearly reveals issues of fact which should have been resolved at plenary trial: (1) The status of the parties; (2) delivery and acceptance; (3) compliance with the purchase orders.

The court below found that H & H purchased the plants from BLH as an independent contractor pursuant to the terms of an agreement entered into between the parties some two years prior to the purchase (35a). In so doing it made a factual determination as to the status of the parties. In making this determination,

the court recognized the existence of the issue, but failed to credit the affidavit of Lewis Hammond, Jr., verified September 12, 1973:

> "3. One of our customers, Lizza Industries, Inc. indicated an interest in the purchase of an asphalt plant in the Spring of 1970. Although our company is knowledgeable in the field of heavy machinery, we do not stock, we do not service nor have we any technical experience in connection with asphalt plants. I therefore contacted the district representative of Baldwin-Lima-Hamilton Corporation, Ray Lynn. 4. Mr. Lynn attended every sales meeting which I had with the customer. Mr. Lynn actually negotiated the sale and explained the equipment to the customer. At times when Mr. Lynn's equipment was insufficient to handle the subject, he called the factory from the sales meeting and received answers which he communicated to the customer. 5. The original quotation which was mailed to the customer was drawn by the factory personnel of Baldwin-Lima-Hamilton and communicated to us through Ray Lynn. 6. Thereafter, the asphalt plant was delivered by Baldwin-Lima-Hamilton Corporation directly to the customer Lizza Industries, Inc. Immediately after delivery to the customer, we received complaints from the customer which were communicated to the factory. Many meetings were held between the customer, ourselves and factory representatives with respect to the defects complained of by the customer. 7. Whatever our relationship may be in the sale of machinery that we stock and inventory, the relationship between Baldwin-Lima-Hamilton Corporation and Hodge & Hammond for the purpose of the sale of asphalt plants was strictly one of manufacturer and salesman" (65a-66a).

The position of H & H as outlined in Mr. Hammond's affidavit was supported by Lizza's complaint in the state court (14a-15a).

The answer interposed by H & H alleged that H & H acted solely as a sales agent in these transactions (8a-9a). This position which was supported by an affidavit upon actual knowledge (65a-67a) and the exhibit (14a-15a) must be taken as true for the purpose of the motion.

First National Bank of Cincinnati v. Pepper, supra:

> "Furthermore, when the factual allegation of the pleadings of the party opposing summary judgment are supported by affidavits or other evidentary material, they must be taken as true in ruling on the motion."

Additionally, the court below accepted the offer of BLH for a substituted Exhibit D in violation of local general Rule 9(m) without the opportunity of H & H to respond or offer other and contradictory evidence. This was patently unfair to H & H and certainly deprived it of a fair presentation of its side of the case. The very last sentence of the substituted Exhibit D raises an inference requiring a denial of the motion. That sentence reads: "Confirmation of Ray Lynn conversation to Ed Parkhill." Both Mr. Lynn and Mr. Parkhill are employed by BLH. The substituted Exhibit D therefore, when read in a light most favorable to H & H, further confirms its position that H & H did not negotiate or participate in this transaction, other than as a sales agent.

The opinion below assumes the applicability of the dealer's agreement to these sales (35a).

In his affidavit, based upon his personal knowledge, Lewis Hammond, Jr., specifically denies that the agreement was applicable to these sales (66a). No affidavit based upon personal knowledge, or any other evidence, has been submitted to contradict the factual allegations made in Mr. Hammond's affidavit.

As genuine and material issues of fact have been raised by the pleadings, supported by affidavit made upon personal knowledge and buttressed by an exhibit, the motion for summary judgment should have been denied.

Adikes v. S. H. Kress, supra;
Zig-Zag Spring Co. v. Comfort Spring Co., 89 F. Supp. 410;
First National Bank of Cincinnati v. Pepper, supra.

POINT TWO.

BLH failed to submit proper proof of all the elements of its cause of action and was therefore not entitled to judgment.

Even apart from the factual issues raised in the opposing affidavits, BLH has failed to show that it is entitled to a judgment.

In order for BLH to obtain judgment it was incumbent upon it to submit proof as to every element of its cause of action which was at issue in order that the court could determine that it was entitled to judgment as a matter of law. *Rule 56 c, FRCP.*

The issues raised in the pleadings are: (1) the relationships of the parties to each other and to Lizza; (2) delivery to and acceptance by H & H of asphalt plants in question; (3) the alleged breach of warranty pending in the state court action.

Rule 56 (e), FRCP, requires that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and

shall show affirmatively that the affiant is competent to testify to the matters therein."

BLH attempts to support its motion for summary judgment upon the affidavits of its attorney *who was without personal knowledge.* It also offered exhibits, the relevancy of which was based *only* upon the affidavit of its attorney who, without personal knowledge, would be incompetent to testify at the trial of the action. These affidavits should not have been received or considered by the court below.

There is absolutely no attempt to substantiate delivery and acceptance of the plant about which issues were raised in the pleadings and in the affidavit of Lewis Hammond, Jr. (9a, 66a). These issues remain unsupported and the failure of proof in this regard would bar judgment in favor of BLH even after a plenary trial.

Electrical Fittings Corp. v. Thomas and Betts Co., 3 F. R. D. 256.

POINT THREE.

The denial of the application for leave to serve a third-party summons and complaint or otherwise permit the dispute to be resolved in a forum where all the parties were before the court was improvident and substantially prejudiced a fair and just result.

H & H moved the District Court pursuant to *Rule 14, FRCP,* for leave to add Lizza as a third-party defendant or, in the alternative, to relegate the parties to the state court proceeding already commenced, or for a stay of the action pending the outcome of that state court proceeding (11a-34a).

H & H has not received full payment from the customer for the 6,000-pound asphalt plant referred to in the second cause of action. That fact is readily deduced from the answer interposed by H & H in the state court proceeding (54a-59a). If H & H is indebted to BLH for the smaller asphalt plant, then certainly H & H, in turn, should be paid by Lizza. No matter what view of the relationship between H & H and BLH will ultimately prevail, H & H will be the middle man between the manufacturer, BLH, and the customer, Lizza.

If the decision below is permitted to stand, BLH will be entitled to immediate payment from H & H, while Lizza's liability to H & H remains unresolved. This is totally unfair to H & H. The denial of the motion to bring all of the parties before the court was improvident and should be reversed.

All of the issues raised by the sales of these two plants can be more easily and efficiently resolved in a state court proceeding which was commenced prior to this action. It is respectfully submitted, that as the court recognized the propriety of staying the first cause of action pending a resolution of the state court proceeding, that same determination would be be proper for the entire case.

CONCLUSION.

The judgment below should be reversed. The entire action should be stayed pending the outcome of the state court proceeding or, in the alternative, a third-party summons and complaint should issue so that all affected parties are brought before the same tribunal.

Dated: Mineola, N. Y.,
January , 1974.

Respectfully submitted,

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Service of three (3) copies of
the within Brief is
hereby admitted this 5th day
of February, 1974
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